Tracker Marine, L.L.C. *and* Delbert "Dubb" Wayne Hanks, Jr. and Robert Mason. Cases 17–CA–20699–1 and 17–CA–20699–2.

June 6, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS COWEN AND BARTLETT

On May 4, 2001, Administrative Law Judge Keltner W. Locke issued the attached bench decision. Charging Party Mason filed exceptions and a supporting brief. The Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. June 6, 2002

Peter J. Hurtgen, Chairman

William B. Cowen, Member

Michael J. Bartlett, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Mary G. Taves, Esq. and *Mike Werner, Esq.*, for General Counsel.

Ransom A. Ellis, Esq. (Ellis, Ellis, Hammonds, & Johnson, P.C.) of Springfield, Missouri, for Respondent.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on March 20–22, 2001 in Lebanon, Missouri. On March 23, 2001, after the parties had rested, I heard oral argument, and later that same date, issued a bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Board's Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A [omitted from publication]," the portion of the transcript containing this decision.[1] The conclusions of law and Order are set forth below.

CONCLUSIONS OF LAW

1. The Respondent, Tracker Marine, L.L.C., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent did not violate the Act as alleged in the complaint.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended[2]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. May 4, 2001

APPENDIX A

This is a bench decision in the case of Tracker Marine, L.L.C, which I will call the "Respondent," and Robert Mason, an Individual, and Delbert "Dubb" Wayne Hanks, Jr., an Individual, whom I will call the "Charging Parties." The case numbers are 17–CA–20699–1 and 17–CA–20699–2.

This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. The credited evidence does not establish that Respondent violated Sections 8(a)(1) and (3) of the National Labor Relations Act, as alleged in the Complaint. Therefore, I recommend that the complaint be dismissed.

This case began on May 30, 2000, when Charging Party Mason filed the initial charge in Case 17–CA–20699–1. On June 14, 2000, Charging Party Hanks filed the initial charge in Case 17–CA–20699–2. On November 15, 2000, Charging Party Hanks filed an amended charge in Case 17–CA–20699–2.

After investigation of the charges, the Regional Director of Region 17 of the National Labor Relations Board issued a Complaint and Notice of Hearing, which I will call the "Complaint," on November 16, 2000. In issuing this complaint, the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the "General Counsel" or as the "government." The Respondent filed a timely Answer to the Complaint, which I will call the "Answer."

The hearing opened before me in Lebanon, Missouri, on March 20, 2001. At that time, the General Counsel amended the Complaint, and Respondent answered these allegations on the record.

The parties presented evidence on March 20, 21 and 22, 2001. After the presentation of evidence, counsel presented

[1] Charging Party Mason has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[1] The bench decision appears in uncorrected form at pages 683 through 710 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this Certification.

[2] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

oral argument. Today, March 23, 2001, I am issuing this bench decision.

Based upon the admissions in Respondent's Answer, I find that the government has proven all the allegations in Complaint paragraphs 1, 2, and 3. Specifically, I find that the charges in this case were filed and served as alleged, and that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Additionally, I find that the United Brotherhood of Teamsters Local Union No. 245, which I will call the "Union," is a labor organization within the meaning of Section 2(5) of the Act.

Respondent has admitted certain allegations in Complaint paragraph 4, but has denied other allegations raised by that Complaint paragraph. Based upon Respondent's admissions, I find that at all material times, the following individuals were Respondent's supervisors within the meaning of Section 2(11) of the Act, and its agents within the meaning of Section 2(13) of the Act: Plant Manager Jim Rabe; Human Resources Manager Don Holder; and Greg McFadin, both in his present position of shipping manager and in his previous position of shipping supervisor.

Additionally, based upon Respondent's admissions, I find that while Joe Prather was Respondent's human resources manager, he was Respondent's supervisor within the meaning of Section 2(11) of the Act and its agent within the meaning of Section 2(13) of the Act.

Further, based on Respondent's admissions, I find that at all material times until about September 8, 2000, when he left Respondent's employment, Transportation Supervisor Eugene Johnson was Respondent's supervisor and agent within the meaning of Sections 2(11) and 2(13) of the Act.

The Complaint, as amended, alleges that Johnny Morris is Respondent's owner, that Mike Roland is Respondent's human resources manager at its Springfield, Missouri headquarters, and that both Morris and Roland are Respondent's supervisors and agents. Respondent has denied that Morris is Respondent's owner and has further denied that it employs Roland. However, Respondent has admitted that both Morris and Roland are its agents within the meaning of Section 2(13) of the Act, and I so find.

The burden of proving supervisory status rests with the party asserting that such status exists. I find that the government has failed to prove that the remaining individuals identified as supervisors in complaint paragraph 4 are statutory supervisors or Respondent's agents.

The evidence does indicate that one of these individuals, Dispatcher Shane Holiman, has authority to grant a driver a day off work. Holiman also apprises his superior of such actions.

The record does not establish that such actions are other than routine. In other respects, the evidence does not establish that Respondent has imbued Dispatcher Holiman with actual or apparent authority sufficient to establish agency status. Therefore, I do not find that Holiman is Respondent's supervisor or agent within the meaning of Sections 2(11) and 2(13) of the Act.

Paragraph 5(a) of the amended Complaint alleges the following: "In or around December 1999 through April 2000, on approximately 2 to 3 occasions, by Cliff Mulligan, at Respondent's facility, told employees that Respondent could shut down the transportation department and use all contract drivers if the employees at Respondent's Lebanon facility chose the Union as their representative." Complaint paragraph 7 alleges that this action interfered with, restrained, and coerced employees in the exercise of protected rights, in violation of Section 8(a)(1) of the Act.

Respondent has admitted that Mulligan was its supervisor and agent during the time period in which he allegedly made the statements described in Complaint paragraph 5(a). Should the evidence prove that Mulligan made such statements in the presence of employees, I would find that Respondent violated Section 8(a)(1) of the Act, as alleged.

To establish this allegation, the government relies upon the testimony of Eugene Johnson, who was Respondent's transportation supervisor before he quit in September 2000. Johnson testified that he "heard it stated by Cliff Mulligan that if the drivers voted in a union that Johnny Morris would never stand for it and that the whole thing would be done away with and everything would go contract hauler." According to Johnson, Mulligan made such statements "probably two or three times."

Johnson testified that on one occasion, Mulligan made this statement in the presence of clerk Annette Griffith. However, Mulligan expressly denied making the statement attributed to him. The government did not call Griffith as a witness, and thus, Johnson's testimony is not corroborated.

Johnson also testified that Mulligan made a similar statement in the presence of Shane Holiman, Pam Becker and Eddy Ryan. Again, Mulligan denied making the statement which Johnson attributed to him.

Holiman testified that he did not hear Mulligan make such a statement. Becker also testified that she never heard Mulligan make such a statement. The government did not call Ryan as a witness, and he did not testify. Thus, Johnson's testimony is not corroborated.

Johnson also testified that Mulligan made a similar statement to a driver, Dwayne Corneilson. However, the General Counsel did not call Corneilson as a witness and he did not testify.

I cannot credit Johnson's testimony. Although he identified a number of witnesses who supposedly heard the alleged statements, none of these witnesses confirmed his testimony. The witnesses who did testify denied hearing Mulligan make the statements attributed to him.

Considering that Mulligan denied making the statements attributed to him, and that two persons identified as witnesses denied hearing Mulligan make the alleged statements, it would be reasonable to expect the government to elicit testimony from other persons who supposedly heard the statements in question. From Johnson's testimony, the government knew of three such persons—Griffith, Ryan and Corneilson—who presumably could be called to corroborate Johnson's account. However, the government did not call any of them.

In these circumstances, I do not credit Johnson's testimony. Therefore, I recommend that the Board dismiss Complaint paragraph 5(a).

Paragraph 5(b) of the amended Complaint alleges as follows: "On or about January 18, 2000, Respondent, by Cliff Mulligan, at Respondent's facility, told employees that their activities on behalf of the Union, or other protected, concerted activity, reflected negatively on their employment with Respondent."

I find that credible evidence does not establish this allegation. Therefore, I recommend that it be dismissed.

Complaint paragraph 6(a) alleges that "On or about January 18, 2000, Respondent issued two written warnings" to employee Robert Mason. At hearing, the General Counsel placed the two warnings in evidence. One is dated January 14, 2000

and the other is dated January 18, 2000. The Respondent admits that it issued such warnings to Mason, but denies that doing so violated the Act.

Complaint paragraph 6(b) alleges that on or about April 27, 2000, Respondent issued two written warnings to employee Delbert Wayne Hanks, Jr., and suspended Hanks. Respondent admits these allegations, but denies that these actions violated the Act.

Complaint paragraph 6(c) alleged that on or about April 28, 2000, Respondent discharged employee Hanks. Respondent admits discharging Hanks, but denies that doing so violated the Act.

Complaint paragraph 6(d) alleges that on or about May 25, 2000, Respondent discharged employee Robert Mason. Respondent admits discharging Mason as alleged, but denies that the discharge violated the Act.

Complaint paragraph 6(e) alleges that Respondent engaged in the conduct alleged in paragraphs 6(a) through 6(d) because Hanks and Mason and other employees formed, joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities. Respondent denies this allegation.

To evaluate these allegations, I will use the framework which the Board established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must establish four elements by a preponderance of the evidence. First, the government must show the existence of activity protected by the Act. Second, the government must prove that Respondent was aware that the employees had engaged in such activity. Third, the General Counsel must show that the alleged discriminatees suffered an adverse employment action. Fourth, the government must establish a link, or nexus, between the employees' protected activity and the adverse employment action.

In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083, at 1089. See also *Manno Electric, Inc.*, 321 NLRB 278, 280 at fn. 12 (1996).

The record establishes that in late February or early March 1999, employee Mason spoke with a Union representative regarding organizing Respondent's employees. Additionally, on one occasion in September 1999, Mason met with three or four of Respondent's drivers and discussed the Union. This meeting took place outside the guard shack at Respondent's facility.

However, Mason did not distribute union authorization cards to employees. Additionally, he did not engage in handbilling or picketing.

Beginning in about November 1998, employee Hanks spoke with other drivers about organizing a union. Hanks testified that this effort slowed in about March 1999. However, Hanks never spoke with any employee about signing a union authorization card. Additionally, he never organized or participated in handbilling.

The evidence establishes that both Mason and Hanks engaged in union activities protected by the Act. Therefore, I conclude that the General Counsel has established the first *Wright Line* element.

Next, the government must establish that the Respondent knew that Mason and Hanks had engaged in such activity. Eugene Johnson testified that shortly before Thanksgiving in 1999, Joe Prather, who was then Respondent's human resources manager, said that the two main individuals in the union organizing effort were Mason and Hanks.

Additionally, Johnson gave other testimony which, if credited, would suggest that Respondent's management associated Mason and Hanks with union organizing. For example, Johnson testified that in January 2000, Shipping Manager Mulligan, directed him to issue Mason a warning in connection with an incident in which a canopy hung improperly from the headrack of Mason's truck. Although this instruction would not signify management knowledge of Mason's union activity, Johnson testified that Mulligan also told Johnson to look through Mason's personnel file to see if there were any other write–ups which could be "accumulated." Presumably, Mulligan's intent to "make a case" against Mason might suggest hostility from which knowledge of Mason's union activity could be inferred. Mulligan denied ever giving such an instruction to Johnson.

Further, Johnson testified that after Donald Holder became personnel manager, he told Johnson that he, Holder, wanted to interview job applicants because he would be more likely to spot union "plants." Holder denied making this statement.

I do not credit Johnson's testimony. As previously discussed, other witnesses failed to corroborate the testimony Johnson gave pertaining to the allegations in Complaint paragraph 5(a) and I concluded that Johnson's version was not reliable.

There are other reasons to doubt the reliability of Johnson's testimony. According to Johnson, in November 1999, other businesses in Lebanon had become so concerned about the union organizing drive that they were calling the human resources managers to say "hey, we don't want this going on." That testimony seems quite implausible.

Neither Mason nor Hanks passed out authorization cards. Neither handbilled or picketed. Moreover, the record does not establish that any other employee distributed authorization cards or engaged in handbilling or picketing. The evidence suggests only that employees were talking about the union among themselves. In these circumstances, it seems quite unlikely that other businesses in Lebanon would know about the union organizing effort, or become so alarmed about it that they would contact Respondent's human resources department to say "we don't want this going on."

In sum, Johnson's testimony does not have a reassuring ring of authenticity. Therefore, to the extent that Johnson's testimony contradicts that of other witnesses, I do not credit it.

Nonetheless, the record provides sufficient evidence to establish that Respondent's management did know about Mason's union activities. For example, Shipping Manager Gregory McFadin testified that Mason's name did come up in connection with the Union. Human Resources Manager Holder testified that he had heard a rumor that Mason had been trying to start a union.

I find that the General Counsel has established the second *Wright Line* element with respect to Mason, but not with respect to Hanks.

The government also has established the third *Wright Line* element. Disciplinary warnings, suspensions, and discharges certainly are adverse employment actions.

However, I find that the General Counsel has not established the fourth *Wright Line* element. The evidence does not prove a connection between the protected activities and the adverse employment actions taken against Mason and Hanks.

Even the evidence most favorable to the General Counsel's case, the testimony of Eugene Johnson, falls short of proving such a link. To the contrary, Johnson's testimony, as well as that of other witnesses, establishes that Respondent's management took the disciplinary actions against Mason and Hanks in response to specific instances of work–related conduct unrelated to union activities.

Respondent issued Mason the January 14, 2000 warning after distribution manager Mulligan saw Mason's truck pull in with a canopy hanging over the side. Mulligan credibly testified that he decided that Mason should receive a warning because as Mason was driving the truck, he should have seen that the canopy top was loose and pulled over to repair the problem. However, Mason admitted, during cross–examination, that he did not notice that the canopy had slipped out of position until he returned to the facility and got out of the truck.

The General Counsel argues that Respondent had failed to discipline other drivers for similar conduct, and that such disparate treatment suggests that Respondent had some other motivation, namely an unlawful motivation, for issuing the warning to Mason. However, the record does not establish such disparate treatment.

Distribution Manager Mulligan credibly testified that a driver will not be disciplined if the problem resulted from circumstances outside the driver's control. However, Mulligan concluded that Mason should have been able to see that the canopy top was loose, and that Mason had the opportunity to stop enroute to secure it.

In these circumstances, the record falls short of demonstrating that Respondent treated Mason more harshly than it had treated other employees in similar circumstances. Additionally, no other evidence suggests that Respondent disciplined Mason because of his Union activity rather than because he failed to spot and correct the out–of–place canopy. Therefore, I find that the government has not established a link between Mason's protected activity and the January 14, 2000 warning.

The record also fails to establish a link between Mason's protected activity and the warning he received on January 18, 2000. That warning concerned an assignment for Mason to drive a load of boats to Tulsa, Oklahoma. The load included a boat to be displayed in a boat show, and it was important to make the delivery before the show opened to the public.

Mason reported to the Respondent's facility in the evening on January 17, 2000. When Mason arrived, he could not find the tractor unit he had been assigned to drive. A guard told him that his records indicated another driver had taken the tractor.

Mason did not wait at the facility for another driver to return with a tractor unit which Mason could have attached to the trailer and driven to Tulsa. Instead, Mason testified, he made several telephone calls and then went home, which is at least a 45 minute drive from the facility.

Mason could have returned to the facility later or he could have telephoned the guard shack to find out if another driver had returned with a tractor unit which he could use. However, Mason did not call in until about 7 o'clock the next morning, a time too late to deliver the boat on time to Tulsa.

Had Mason left home at the time he called in, he would not have arrived at the facility until about 7:45 a.m. Mason testified that it takes more than 4 hours to drive from Lebanon to Tulsa. Therefore, Respondent concluded that Mason had not allowed himself enough time to deliver the boat by the 9 a.m. deadline.

Respondent did not wait for Mason to report for work, but instead assigned another driver to take the load to Tulsa. Management issued Mason a warning on January 18, 2000. The warning stated, in part, "Instead of being back later in the evening or leaving early Tuesday AM to arrive at 9 AM, he called at 7 AM and was told the load had been given to another driver."

The parties differ greatly on whether Respondent treated Mason fairly. However, that question is not before me. Rather, I must decide whether a link exists between Mason's union activities and Respondent's decision to issue him a warning. The record does not establish such a connection. There is no evidence to indicate that management took Mason's union activity into account when deciding to discipline him. Rather, the credited evidence clearly demonstrates that management disciplined Mason because he did not report to the facility early enough to deliver the boat to Tulsa on time. Therefore, I conclude that the government has not established the fourth *Wright Line* element.

I recommend that the Board dismiss the allegations in Complaint paragraph 6(a).

With respect to Complaint paragraph 6(b), on April 26, 2000, Respondent issued two warning notices to employee Hanks and suspended him from work for two days. One of the warning notices concerned Hanks' failure to attend a drivers' meeting conducted on April 15, 2000, and his subsequent failure to talk to his supervisor about the matter after being asked to do so. This notice states as follows:

> There was a drivers meeting breakfast on April 15, 2000 which Dub [Hanks] failed to attend. Greg [McFadin] had personally requested that he come see me about missing the meeting. He failed to do so. Considered insubordination.

There is no question that Hanks did not attend the meeting and that he did not see his supervisor about it, as he had been requested to do. This meeting concerned safety matters and Respondent expected its drivers to attend.

The government urges that the stated reasons for this warning are pretextual. Counsel for the General Counsel notes that 11 days elapsed between the time of the meeting and issuance of the warning, and that a number of other drivers did not attend the meeting but did not receive discipline. The record suggests that perhaps 8 drivers failed to attend this meeting, and that about half of them would have been excused from attendance because they were on the road.

However, I believe the government's arguments overlook the gravamen of the disciplinary action. Hanks' failure to attend the meeting might not, by itself, have warranted a written warning, but he also ignored the instruction to see his supervisor about the meeting. Doing so manifested a continuing indifference to following the orders of supervision.

The record does not establish that any other driver who failed to attend the meeting also failed to follow a subsequent instruction to meet with his supervisor about it. Therefore, the evidence falls short of demonstrating that Respondent treated Hanks disparately.

Also on April 26, 2000, Respondent issued Hanks a warning concerning a failure to go to the Respondent's plant in Mur-

freesboro, Tennessee, after delivering a load to a location in nearby Nashville. Hanks blamed the dispatcher, rather than himself, for this error.

The issue before me concerns the Respondent's motivation for issuing the disciplinary warning, and, more specifically, whether anti–union animus played a role in the decision–making process. The evidence does not establish that management considered Hanks' union activity when it decided to issue this warning.

Because Hanks had received two warnings, management increased the penalty to a two–day suspension. The record does not establish that anti–union animus played a part in the decision to impose a suspension.

In sum, the government has not established a connection between Hanks' protected activities and the disciplinary action taken against him on about April 26, 2000. Therefore, the General Counsel has not established the fourth *Wright Line* element, and I recommend that the Board dismiss the allegations raised by Complaint paragraph 6(b).

Complaint paragraph 6(c) alleges, Respondent admits, and the record establishes that Respondent discharged employee Hanks on about April 28, 2000. The evidence regarding this action paints a clear and consistent picture of the events leading up to the discharge.

On April 26, 2000, Hanks attended a meeting with Shipping Manager Greg McFadin and Traffic Supervisor Eugene Johnson. At this meeting, the supervisors gave Hanks the warnings and suspension which I have just discussed. Hanks, blaming dispatcher Shane Holiman for the failure to pick up the load in Murfreesboro, lost his temper and threatened to knock Holiman's teeth down his throat.

Hanks did not deny losing his temper. In fact, Hanks testified that he "went off like a rocket." He also testified, "I got upset, very upset."

The two supervisors described Hanks' anger in similar terms. According to McFadin, Hanks "went ballistic," a term suggesting the same uncontrolled reaction as Hanks' expression that he "went off like a rocket."

Both McFadin and Johnson quoted Hanks as saying that he was going to knock "Shane Holiman's fucking teeth down his throat" and Hanks himself acknowledged that he may have used these words. When asked if he believed Hanks would carry out this threat, Johnson replied, "I was pretty nervous, yes." Johnson also admitted that in his pre–trial affidavit, he had stated that Hanks was "a big guy and we were afraid he was going to do it."

Management's actions also indicate that they took the threat seriously. After management decided to discharge Hanks, Human Resources Manager Holder arranged for Respondent's chief of security to be present during the termination interview. Additionally, Holder credibly testified that he asked two women who worked nearby to go somewhere else during the discharge interview, in case Hanks became angry again.

The General Counsel urges that Respondent treated Hanks disparately. Hanks described an instance in which another employee, named Ryan, punched McFadin but McFadin, instead of discharging Ryan, laughed the matter off. The Respondent countered by eliciting testimony from another witness that Ryan and McFadin were friends.

The question I must decide concerns whether anti–union animus played a part in Respondent's decision to discharge Hanks. Under certain circumstances, such animus may be inferred from disparate treatment. However, I do not believe it would be appropriate to draw such an inference here.

In part, my reluctance to infer animus arises from the vagueness of the testimony concerning the incident in which Ryan reportedly hit McFadin. Before concluding that Respondent had treated two employees differently for similar conduct, it is necessary to know enough about the conduct to be assured that it really was similar. Here, the record is sketchy about what happened between Ryan and McFadin, and I do not believe there is sufficient information to reach the conclusion that the circumstances were similar.

More fundamentally, the record in this case contains no evidence to establish that Respondent's supervisors considered Hanks' union activities when they decided to discharge him. To the contrary, a consistent picture emerges that Hanks' loss of temper alarmed management and prompted the managers to make a decision they otherwise would not have made, namely, to discharge Hanks.

In this regard, the testimony of Eugene Johnson is particularly salient. At the time of Hanks' discharge, Johnson was Respondent's traffic supervisor, and was one of the managers participating in the decision to terminate Hanks' employment. Later, Johnson quit his job with Respondent, and testified as a witness for the General Counsel at hearing.

On cross–examination, Johnson admitted stating in his pretrial affidavit that Hanks' union activity would not have influenced his decision to discipline Hanks because Hanks had threatened another employee who was his supervisor, and anyone who threatened a supervisor was terminated or disciplined. Also on cross–examination, Johnson admitted that he was "pretty nervous" when Hanks lost his temper.

Additionally, Johnson wrote an April 27, 2000 memorandum concerning the meeting at which Hanks lost his temper. This memo states, in pertinent part, as follows:

> ON WEDNESDAY APRIL 26, 2000, DUB HANKS WAS CALLED TO COME INTO THE TRANSPORTATION OFFICE TO DISCUSS SEVERAL PROBLEMS WITH GREG MCFADIN AND MYSELF. HE WAS TO BE GIVEN TWO WARNINGS...WHEN CONFRONTED WITH THE SUBJECT MATTER OF THESE TWO WARNINGS HE IMMEDIATELY BECAME VERY DEFENSIVE AND AGGRESSIVE. HE SAID SHANE HOLIMAN WAS A LIAR AND HE WAS GOING TO KNOCK SHANES' TEETH OUT.
>
> I WOULD HAVE BEEN MORE SYMPATHETIC HAD DUB NOT IMMEDIATELY SHOWN SO MUCH HOSTILITY AND ANGER, BY THREATENING TO KNOCK SHANES' TEETH OUT.

This memo, almost contemporaneous with the incident, provides further support for a finding that management decided to discharge Hanks because his lost his temper and made threats, rather than for some other reason.

I find that Hanks' loss of temper and threat to harm a supervisor, and not union activity, motivated Respondent's decision to discharge him. Therefore, I conclude that the government has not established the fourth *Wright Line* element, and recommend that the Board dismiss the allegations raised by Complaint paragraph 6(c).

Complaint paragraph 6(d) alleges that on about May 25, 2000, Respondent discharged employee Mason. Although

Respondent admits that it discharged Mason, it denies that it did so for unlawful reasons.

Before discussing the facts, it may be helpful to note that federal regulations limit the number of hours a commercial motor carrier driver can drive without a rest period. The rules, found in Title 49 of the Code of Federal Regulations, are rather complicated. Although this is somewhat of an oversimplification, the rules provide in part that a driver shall not drive more than 10 hours following 8 consecutive hours off duty or for any period after having been on duty 15 hours following 8 consecutive hours off duty.

Drivers must maintain a log keeping track of their hours. Respondent expects its drivers to inform the dispatcher of how many hours they have available to work, so that the dispatcher will assign a particular run to a driver with enough available hours to perform the work lawfully. Rather than calculating the available hours for each driver, management depends on each driver to figure his or her available hours and to provide reliable information to the dispatcher.

In discussing the circumstances leading up to the discharge of Robert Mason, I have relied in part upon the testimony of Dispatcher Shane Holiman. Based upon my observations of the witnesses, I credit his testimony, and that of Shipping Manager McFadin, where there are conflicts in the evidence.

On May 17, 2000, Dispatcher Holiman asked Mason if he could make a run. Mason told Holiman that he did not have enough hours to do so. However, it later became apparent that Mason had sufficient hours on May 17, 2000 to drive.

Shipping Manager McFadin became concerned that Mason had provided inaccurate information to the dispatcher on May 17, 2000. Later, McFadin formed the opinion that on May 18, 2000, Mason again had given the dispatcher incorrect information. Therefore, McFadin arranged for Mason to meet with Traffic Supervisor Gene Johnson and himself on Saturday morning, May 20, 2000.

At this meeting, McFadin and Johnson told Mason that they believed Mason had lied to the company. They indicated that he would probably receive a warning.

During the meeting, Mason told the supervisors that he had just made a run to Nashville without a layover. He assured McFadin that this run complied with the law, and that because of his available hours, a layover had not been necessary.

However, about an hour after the meeting, Mason telephoned Dispatcher Holiman and wanted to be paid for a layover. Because Mason had not indicated a layover on his trip documents, the dispatcher brought up the matter with McFadin.

At this point, McFadin concluded that Mason had lied to the dispatcher and requested that Mason be discharged. Management decided to discharge Mason, and did so on May 25, 2000. McFadin prepared a disciplinary notice explaining the reason for discharging Mason. This notice stated as follows:

> I ASKED FOR ROBERTS DISMISSAL ON THE GROUNDS THAT HE LIED. THE FIRST INCIDENT WAS ON MAY 17, 2000 WHICH HE ADMITTED TO LYING TO THE DISPATCHER. SECOND, HE LIED ON THURSDAY, MAY 18, 2000, WHEN ASKED HOW MANY MILES HE COULD LEGALLY RUN. THIRD, HE LIED ABOUT LAYOVER PAY AND TRIED TO CHEAT THE COMPANY.
>
> I HAD INFORMED BOB THAT HE WOULD PROBABLY BE RECEIVING A WARNING FOR TELLING LIES ON MAY 17 AN[D] THEN ON MAY 18. HE TURNED AROUND ON THE SAME DAY AND ATTEMPTED TO LIE ABOUT RECEIVING LAYOVER PAY AND TRIED TO DEFRAUD THE COMPANY FOR TWO HOURS OF PAY.
>
> THIS ACTION CANNOT BE TOLERATED ANY FURTHER. WE CONSIDER THIS TO BE GROSS MISCONDUCT. CONSEQUENTLY, EFFECTIVE MAY 25, 2000 BOB MASON IS TERMINATED FROM TRACKER MARINE.

I examine these facts to determine whether there is any link between Mason's union activity and the decision to discharge him. The credited evidence does not establish such a link.

To the contrary, the evidence strongly persuades me that union activity had nothing at all to do with the discharge decision. At the time McFadin learned that Mason was asking the dispatcher for layover pay, McFadin already had become sensitized to the possibility that Mason was not being truthful with the company. Indeed, McFadin had spoken with Mason about this very issue an hour earlier.

Quite predictably, McFadin became upset when Mason disregarded the recent words of warning. It would be consistent with human nature for McFadin to regard Mason's action as an insult to McFadin's intelligence. Notwithstanding that McFadin had found out about Mason's previous misstatements, it now appeared that Mason believed he could get by with the same type of conduct again.

There is an old saying to the effect "Fool me once, shame on you, fool me twice, shame on me." I conclude that the desire to discharge Mason arose not because of Mason's protected activities, but because McFadin believed that Mason was playing the company, and himself, for a fool.

It should be noted that I do not reach the issue of whether Mason actually lied to the company on any of the occasions in question. However, I do conclude that McFadin sincerely believed that Mason had lied, and this sincere belief resulted in McFadin becoming angry and seeking Mason's discharge.

In seeking to establish motivation for the various adverse actions alleged in complaint paragraphs 6(a) through 6(d), the General Counsel has also pointed to a provision in Respondent's employee handbook. This provision states as follows:

> Tracker Marine is committed to providing a good working environment in which our associates cooperate and have a voice. We feel that any third party involvement (including a union) is unnecessary. From time to time, our associates may have problems which require special attention. This book explains how your questions, complaints and problems will be resolved through the cooperation of your co–workers and management. We are proud that our associates provide their own representative voice, and we feel that unions are therefore unnecessary.

The General Counsel has not alleged that this language violates the Act in any way, but points to it only as evidence of animus. I find that this language contains no threat of reprisal or force or promise of benefit. Additionally, I conclude that it does not constitute evidence of unlawful motivation.

In sum, I find that management's desire to discharge Mason did not arise from any union or other protected activity or any intent to discourage such protected activity. Rather, Respon-

dent decided to discharge Mason after Manager McFadin concluded that he had lied.

In these circumstances, the evidence fails to establish a link between Mason's protected activities and the adverse employment action. Therefore, the government has not proven the fourth *Wright Line* element and I recommend that the Board dismiss these allegations.

Because I find that the credited evidence does not establish the violations alleged, I recommend that the Board dismiss the Complaint in its entirety.

When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law, and Order. When that Certification is served upon the parties, the time period for filing an appeal will begin to run. Throughout this proceeding, counsel have acted with civility and professionalism which I truly appreciate.

The hearing is closed.